Supreme Court, U.S.
FILED
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No. 95-778

In The

Supreme Court for the United States

October Term, 1995

BRUCE BUCHBINDER

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

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15 pp

QUESTIONS PRESENTED

1. Should the Court grant certiorari in a case where statements of fact and law go uncontested pursuant to waiver by Respondent, wherein Respondent had an obligation to respond (Rule 15.1) and by not responding renders rebuttal moot, pre-empting any further litigation?

2. Should the Court grant certiorari in a case where statements and allegations go unrefuted, and Respondent by remaining silent, thereby admits to the same?

3. Should the Court grant certiorari when the waiver filed by Respondent pursuant to Rule 15.1 and 15.5 effectively creates an Estoppel In Pais/Estoppel In Laches, thereby preventing Respondent from any further action?

4. Whether the waiver filed by Respondent and the default created thereby, creates the condition of Collateral Estoppel, thereby preventing respondent from action in future cases filed by petitioner involving similar issues?

5. Does an irreconcilable contradiction exist in the United States Judicial system, wherein the issues are not reviewed by the lower courts pursuant to Title 5, United States Codes, Sections 554, 556, 702, 703, and 706, and the Highest Court of the Land refuses to grant certiorari, review the issues, and close the question in keeping with Amendments I and V of the Constitution, or in the alternative does the Waiver create a default condition in favor of petitioner, thereby resolving this contradiction?

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PRELIMINARY STATEMENT

Petitioner Bruce Buchbinder comes before this Court stating there exists an intervening circumstance of a controlling effect, not previously presented to this Court. The intervening circumstance is set forth within the body of the Brief herein.

STATEMENT OF THE CASE

On November 16, 1995, Petitioner Bruce Buchbinder filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, seeking the issuance of a supervisory opinion in review of the actions of the United States Court of Appeals for the Ninth Circuit and the United States Tax Court. The relief sought resulted from the subsequent dismissal of Buchbinder's case by the Ninth Circuit which effectively and subsequently denied Petitioner's constitutionally protected right to procedural and substantive due process, and right to meaningful access to the courts. In addition, Petitioner Buchbinder raised the issue of the waiver filed by respondent in petitioner's previous Supreme Court cases, alleging that the Tax Court ignored the default and the estoppels created thereby, and thereby trampled on petitioner's Constitutional right to Redress of Grievances.

Petitioner presented a case against Respondent, complaining that the Ninth Circuit Court imposed monetary sanctions for an allegation of misconduct that never actually took place coupled with a second subsequent sanction of dismissal. Petitioner stated in the Petition for Writ of Certiorari filed November 16, 1995, pages 8 and 9, that the issues in the first case (alleged misconduct) were confused by the Commissioner and that the Ninth Circuit adopted the Commissioner's confusion,

sanctioning Buchbinder for a frivolous argument that Buchbinder never actually made. The first case (alleged misconduct) led to the present case (dismissal for nonpayment of sanctions), which is herewith on appeal. The instant case was dismissed on the contention that Buchbinder had failed to pay the sanction imposed by the Ninth Circuit in Buchbinder's first appeal. The Petitioner further contended that he was extremely punished by the Ninth Circuit Court of Appeals for something that he never actually did and that the punishment was so extreme that he had been substantially denied access to the meaningful judicial review of his case.

Petitioner therefore alleged he was left without remedy in the denial of his due process rights pursuant to Title 5 U.S.C. §§ 554, 702, 703, and 706, as guaranteed by Amendment V of the United States Constitution; in the denial of his right to petition for Redress of Grievances as guaranteed by Amendment I, and in the denial of his right to meaningful access to the courts as guaranteed by Amendment IX.

Further, petitioner alleged on pages 17 and 20 of the Petition, that the default created by waiver filed by respondent in petitioner's previous Supreme Court cases, precipitated the condition of Collateral Estoppel and touched the instant case.

On November 22, 1995, during pendency of petitioner's Petition for a Writ of Certiorari to this Court, the Solicitor General, Drew S. Days, III, who makes appearance and is counsel for Respondent, admitted to practice before this Court, appeared by brief and filed an express written waiver of right to file in opposition to Petitioner's asserted facts and conclusions. Respondent, in filing waiver pursuant to Supreme Court Rule 15.5, admitted and confirmed the validity and accuracy of Petitioner's statements and allegations. A copy of the waiver

appears in Appendix A.

RESPONSE TO WAIVER

In his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner raised the question of whether the arbitrary dismissal of a litigant's cause of action before the courts, especially an action brought by a Pro Se litigant is the harshest sanction that can be imposed by the courts, and whether such a sanction can rise to the level of denial of proper Due Process, denial of right to petition for a Redress of Grievances and denial of Right to meaningful access to the Courts. These questions remain unanswered in respect to the Petitioner. Petitioner also raised the question of whether the Waiver filed by respondent in petitioner's previous Supreme Court cases, and the default concessions to the validity of petitioner's claims created thereby, creates a condition of Collateral Estoppel in the instant case. Subsequently, after failing to respond to these allegations of the Petitioner that were before the Court, respondent has again defaulted pursuant waiver and is estopped from any further action in this cause.

Petitioner alleged that he had been deprived of his Due Process rights, deprived of his Right to Redress of Grievances, and deprived of his Right to meaningful access to the Courts; petitioner further alleged that the default created by respondent's waiver in petitioner's previous Supreme Court cases, and respondent's failure to object in a timely fashion, having established default, petitioner alleging that since default had been established by waiver in petitioner's previous cases, therefore such waiver in those cases precipitated the condition of Collateral Estoppel in the instant case. Again, after failing to

respond to the above allegations, respondent has defaulted pursuant waiver and is estopped from any further action in this cause.

The Government expressly waived its right to respond in the instant case pursuant to Supreme Court Rule 15.5. Such a waiver, in the face of Petitioner's asserted facts and conclusions, serves to leave the Petitioner's allegations uncontested before the Court and leaves the Respondent unable to later act in contravention of those allegations.

The Government offered no defense against the accusations made by Petitioner, and did not point out any perceived misstatements of law or fact *having an obligation* to do so pursuant to Supreme Court Rule 15.1. The Government specifically chose to waive that right pursuant to 15.5. Such a response is a plea of no contest entered willingly and without coercion. Respondent defaulted in the instant case by tender of express waiver of its obligation to counter petitioner's version of the law and facts, thereby accepting petitioner's version of the law and facts to be true. Respondent did not correct the record as to what issues were proper to bring before the Court, and specifically did not question the basis for the petition, nor question the grounds upon which petitioner raised his petition, nor did the respondent bring to the Court's attention that petitioner raised no valid Due Process issue, nor did Respondent bring to the Court's attention that Petitioner was making assertions which had no valid basis in the record. In short, respondent made no attempt to protect the basis he had established in the lower courts. He made no attempt to show the Court that the issues being raised were based in frivolous and groundless argument, as he had contended in the lower courts, nor did he seek damages for such pursuant to Supreme Court Rule 42.2. Instead, respondent conceded by waiver that

petitioner had indeed not received the Scope of Review mandated by Title 5, Section 706; respondent thereby conceding that petitioner had not received due process of law in the instant case. Further, respondent has again acknowledged his default by waiver. Instead of correcting the record, respondent again waived his right to file a Brief in Opposition, rendering rebuttal moot on these issues, and defaulting again thereby. Petitioner's statements and assertions, unrebutted in the face of Rule 15.1, stand as truth, thereby rendering respondent's rebuttal before the Court moot in the instant case. Under the Common Law Rule of Reasonable Argument, Petitioner therefore claims a default-judgment against Respondent in the instant case and invokes an Estoppel in Pais/Estoppel in Laches. U.S. v. *Schneiderman,* 102 Fed. Supp. 87 (1951) and *States S.S. Company v. Permanente S.S. Corp.*, 231 F.2d. 82 (1956).

CONCLUSION

This Petitioner has a constitutional right under Amendment I and V of the Constitution to Due Process and Redress of Grievance, and where rights secured by the Constitution are involved, there can be no ***rule making*** or ***legislation*** which would abrogate them. *Miranda v. Arizona*, 384 U.S. 436. Therefore, this petitioner has a right to have his issues fully reviewed and adjudicated by the Highest Court in the Land, as this has been an impossibility in the lower courts. Nothing should prevent this full review and adjudication, except in lieu of re-examination by the Court respondent's waiver acts as a default and creates an Estoppel to any further action, otherwise there is no remedy for petitioner's properly pled issues, and this would be repugnant to the Constitution, leaving petitioner at the

mercy of the lower courts, and would ultimately lead to judicial usurpation of powers by the lower courts.

In *Cohens v. Virginia*, 6 Wheat. (1821) 264 at 416; the Court noted that " ... the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of DECIDING, in the last resort all cases in which they are involved" [Emphasis added]. The Court further noted that in construing the words of the Constitution, defining the judicial power, that in the true sense the Court was not bound to construe the words more restrictively than they naturally import, and that the words of the Constitution give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, Laws, and Treaties of the United States.

In their opinion at 403- 404 the Court supposed "... a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

"It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. THE JUDICIARY CANNOT, AS THE LEGISLATURE MAY, AVOID A MEASURE BECAUSE IT APPROACHES THE CONFINES OF THE CONSTITUTION.

WE CANNOT PASS IT BY BECAUSE IT IS DOUBTFUL. WITH WHATEVER DOUBTS, WITH WHATEVER DIFFICULTIES, A CASE MAY BE ATTENDED, WE MUST DECIDE IT IF IT BE BROUGHT BEFORE US. We have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution. QUESTIONS MAY OCCUR WHICH WE WOULD GLADLY AVOID, BUT WE CANNOT AVOID THEM. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. WE FIND NO EXCEPTION TO THIS GRANT, AND WE CANNOT INSERT ONE." [Emphasis added].

Further in *Cohens v. Virginia*, Wheat 6. at 409, the Court noted that, "A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgement was given in another court, and, on such examination, TO AFFIRM OR REVERSE the same according to law." [Emphasis added].

The court further noted at 410-411 " Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to *re-examination*. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal ... for the sole purpose of INQUIRING whether the judgment violates the constitution or laws of the United States, ... Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals

from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to affect every purpose of a writ of error. The mode of removal is form, and not substance. WHETHER IT BE BY WRIT OF ERROR OR APPEAL, no claim is asserted, no demand is made by the original defendant; he only ASSERTS the CONSTITUTIONAL RIGHT to have his defense EXAMINED BY THAT TRIBUNAL whose province it is to construe the constitution and laws of the Union". [Emphasis added].

"The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process."

At 411 the court further noted that, "If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, BUT THE JUDGEMENT IS TO BE RE-EXAMINED, AND REVERSED OR AFFIRMED, IN LIKE MANNER AS IF THE PARTY HAD APPEARED AND ARGUED HIS CAUSE." [Emphasis added].

The Court further noted at 383 - 384, "The constitution gave to every person ... a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, THE FRAMERS OF OUR CONSTITUTION THOUGHT IT NECESSARY, FOR THE PURPOSES OF JUSTICE, TO PROVIDE A TRIBUNAL AS SUPERIOR TO INFLUENCE AS POSSIBLE, IN WHICH THAT CLAIM MIGHT BE DECIDED ... that the judicial power of every well - constituted government must be co-extensive with the legislative, AND MUST BE CAPABLE OF DECIDING EVERY JUDICIAL QUESTION WHICH GROWS OUT OF THE CONSTITUTION AND LAWS." [Emphasis added].

As the judges in *Cohens v. Virginia* commented, "We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." (at 383).

Now therefore, since Respondent has defaulted in the instant case pursuant waiver, accepting petitioner's version of the law and facts to be true, conceding not only that petitioner did not receive Due Process of Law, but further conceding that default existing in previous Supreme Court cases litigated by petitioner precipitates the condition of Collateral Estoppel, there are therefore no grounds for further action in the instant case. The allegations are now decided in favor of the petitioner, as respondent did not defend his position pursuant waiver, and in light of the condition of Collateral Estoppel. Therefore, Respondent is enjoined from any further action on these issues, based on his default, and Respondent's attempts to further this action are blocked by Estoppel In Pais/Estoppel In Laches/Collateral Estoppel.

However, Respondent's default and the estoppels created thereby do not resolve the issue of abuses to litigants in the lower courts such as those manifesting themselves in the instant case. Therefore, the Court should consider granting certiorari in this case.

Petitioner claims damages from the Government in the amount of $750,000 on the grounds that Respondent has defaulted in previous Supreme Court cases litigated by petitioner, as well as the instant case; respondent resting in the position of Nolo Contendere/Non Prosequitur, after having caused petitioner undue disruption in Life, Liberty, and the Pursuit of Happiness; time and effort spent in research, in preparing briefs and pleadings and expense of court filing fees; these cases all being interrelated by similar issue, and having been litigated over a period of a decade (Tax Court Docket Nos. 41563-85, 8927-92, 3187-93, 8262-94 respectively; Ninth Circuit Court of Appeals Docket Nos. 92-70114, 94-70188, 95-70259, 95-70553 respectively; Supreme Court Docket Nos. 93-798, 94-620, 95-483, 95-778 respectively).

Respectfully submitted,

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DATED: December 5, 1995

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BUCHBINDER, BRUCE Petitioner	)	
vs .	)	No. 95-0778
COMMISSIONER OF INTERNAL REVENUE	)	

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the court.

DREW S. DAYS, III
SOLICITOR GENERAL

November 22, 1995

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